WILLS — EXECUTION — ATTESTING WITNESSES: HUSBAND OR WIFE OF LEGATEE AS WITNESS. — This action was brought by the heir at law to contest a will on the ground that the husband of one of the legatees was a subscribing witness thereto. *Held*, that such relationship does not disqualify the husband from being a subscribing witness. *Lanning* v. *Gay*, 78 Pac. Rep. 810 (Kan.).

Where a devise or bequest is made to either husband or wife of an attesting witness, by the decided weight of authority such witness is thereby disqualified. *Sullivan* v. *Sullivan*, 106 Mass. 474. In arriving at this conclusion courts are guided by the consideration that such witnesses are incompetent on account of personal interest, and that a husband and wife cannot ordinarily testify for or against each other. In some jurisdictions, however, where bequests to subscribing witnesses are void by statute, a strained interpretation makes a bequest to the husband or wife of such a witness invalid, thus rendering the witness competent by removing the objectionable element of interest. *Jackson, ex dem. Beach* v. *Durland*, 2 Johns. Cas. (N. Y.) 313. In a few jurisdictions where a husband and wife are permitted by statute to testify for or against each other, the interest of either party in a bequest to the other is considered too remote to disqualify him or her as an attesting witness. *Lippincott* v. *Wikoff*, 54 N. J. Eq. 107. The principal case, which apparently holds the whole will valid, seems to have gone farther than any previous one in arriving at this result without statutory aid.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

WAR RISKS IN MARINE INSURANCE. — This subject, which since the breaking out of the Russo-Japanese war has naturally been of special interest, is considered in a recent article by a French writer. *De quelques questions relatives à l'assurance des risques de guerre*, by Emile Audouin, 31 J. du Droit Internat. Privé 1025 (Nos. XI.–XII., 1904). It was formerly the practice, he says, for the same policy to cover both ordinary perils of the sea and war risks, for a single premium. But gradually a change was made, until in 1900 the principal marine insurance companies operating in Europe adopted the principle of a special policy for each kind of risk.

The change makes necessary an exactness in the legal definition of ordinary and war risks not required before. If the insured has to cover the two in different companies, it is important for him to see that there are no gaps to leave him without protection, as will happen if the war risk contract is held not to cover a loss, which the law governing the ordinary risk contract would not consider the result of an ordinary peril. If he can sue on both policies in the same country, there is little danger that the decisions will not supplement each other. But one who insures in France against ordinary perils and in England against war risks, may find the difference between English and Continental jurisprudence a grave matter. England determines whether a loss is caused by war by what seems to the Continental mind a very narrow principle, that of proximate cause. An example is the holding that the insurers against ordinary risks are liable for the loss of a vessel which went ashore because the Confederates had extinguished the light on Cape Hatteras. The immediate cause of the loss was the striking on the reef, not the act of war. And in the Spanish-American war the United States vessel Columbia, cruising at night without lights in conformity with orders, struck and sank a British vessel. The French court held the war risk insurer responsible, but Douglas Owen, an English authority, declares an English court would have held differently, for the war had nothing directly to do with the loss; a war vessel without lights might have done the same damage in manœuvers in time of peace. M. Audouin summarizes the English view as holding the risk an ordinary one, unless there is a direct act of hostility against the object insured. The more liberal Continental view is that if it can reasonably be said that the loss would not have happened except for the war, the war

risk insurers are liable, although the immediate cause was stranding or collision. An explanation, if not a justification, of the English view, the writer finds in the fact that the separation of the two risks in England was made piecemeal, while on the Continent it was made complete at once. In England first the clause "free from capture, seizure, and detention," was introduced. This exception was, in accordance with contract law, narrowly construed, and damage caused in an attempt to avoid capture was held to be covered by the policy. Now the excepting clause has been enlarged so as to include attempts at seizure and all consequences of popular uprisings and operations of war, and special war risk policies stipulate to cover all risks included in the clause. But, with what seems to the French writer excessive respect for precedent, the English courts have maintained their narrow interpretation, and he thinks the rule so well settled that it will be long before there is any change.

ANTICIPATORY BREACH. — In a late article upon this subject, the writer, while disclaiming any effort to justify in theory the general rule allowing recovery by one party before the time of performance, on repudiation by the other, discusses the grounds on which that doctrine seems to rest. *The Doctrine of Anticipatory Breach*, by Colin P. Campbell, 60 Cent. L. J. 64 (Jan. 27, 1905). He points out that these decisions have been based on two different views of the situation. The first, which is illustrated in Hochster *v.* De la Tour (2 E. & B. 678) is that the action is based on an implied undertaking in the original contract, to do nothing inconsistent with the contractual relation before the time of performance. This he attacks on two grounds, — the general one applicable to any theory justifying anticipatory breach, that the doctrine does not seem to extend to commercial paper; and the particular objection, that the damages recovered must be very slight, representing only the breach of the implied contract, since the contract to perform is still unbroken. The latter argument is hardly valid, since in all contracts involving several promises to be performed at different times, a breach of the first, if it would naturally lead to the abandonment of the others, is sufficient foundation for a recovery of damages based on a breach of all the obligations, though the time for the performance of some has not yet arrived. "This is law where the doctrine of Hochster *v.* De la Tour is denied, as well as where it is admitted." See 14 HARV. L. REV. 435 and cases cited. The main difficulty with the explanation based on the implied promise is the difficulty of finding the promise, and the fact that, in cases where the parties, after repudiation, decide to go on and complete, no action, even for nominal damages, seems ever to have been allowed for the breach of such an implied obligation.

As the real ground of the decisions, the author elaborates the view suggested in Johnstone *v.* Milling (16 Q. B. D. 460), that the repudiation by one party amounts to an offer of rescission, which, when accepted by action thereon by the other, makes a binding contract rescinding the old, in which new contract the law will imply a promise on the part of the one in default, to pay all damages resulting from the destruction of the original agreement. If there were such rescission, it would certainly prevent recovery on the ground first set forth, since the implied promise, if it ever existed, would then be superseded, but it is perhaps difficult to see an offer and acceptance in the repudiation and action upon it. Nor does the view furnish a satisfactory explanation of the decisions. Action has uniformly been brought, and recovery had, on the original contract, not on a second one, so that we have no precedent for implying any obligation in the contract for rescission. It may be contended that the declaration in such a case contains facts which the courts will construe into two contracts, allowing recovery on the second. But it is difficult to see how, in a case where bringing the action is the sole act which could be construed as an acceptance, the declaration which alleges only the repudiation by the defendant sets forth any second contract. The article is interesting and well argued, but the new explanation seems to be more involved than the old, and to rest on no firmer foundation. See 14 HARV. L. REV. 428 *et seq.*